

BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD

MARTHA P. SILVA

Claimant

V.

NATIONAL BEEF PACKING CO., LP

Respondent

AND

AMERICAN ZURICH INSURANCE CO.

Insurance Carrier

Docket No. 1,045,632

ORDER

Claimant, through Conn Felix Sanchez, of Kansas City, requests review of Administrative Law Judge Pamela J. Fuller's August 10, 2015 Order. Shirla R. McQueen, of Liberal, appeared for respondent and insurance carrier (respondent). Both parties have submitted briefs and the case has been placed on the summary docket for disposition without oral argument.

RECORD AND STIPULATIONS

The appeal record is the same as that considered by the judge and consists of the September 4, 2009 preliminary hearing transcript, the December 12, 2014 motion hearing transcript, and the August 7, 2015 motion hearing transcript, along with all exhibits for each transcript, in addition to all pleadings contained in the administrative file. No stipulations were taken by the court or presented by the parties.

ISSUES

This claim did not proceed to a final hearing, settlement hearing or an agreed award within five years from the date claimant's application for hearing was filed. Pursuant to K.S.A. 44-523(f), the judge dismissed the claim.

Claimant requests the Order be reversed and argues the judge should not have dismissed her claim because she was still receiving medical treatment and was not yet at maximum medical improvement (MMI). Claimant asserts respondent is being rewarded for failing to provide her with medical treatment.

Respondent contends the Order should be affirmed. Respondent argues claimant refused recommended medical treatment and went years without seeking medical treatment for her work-related injuries. Respondent asserts claimant failed to timely prosecute her claim and only sought medical treatment because the statute of limitations was set to expire on her claim.

The sole issue is: does K.S.A. 44-523(f) bar the claim?

FINDINGS OF FACT

Claimant started working at respondent on December 9, 2008. She testified repetitive work with a knife and hooks caused her to have swollen fingers on her right hand and left shoulder symptoms.

Terrence Pratt, M.D., evaluated claimant on April 10, 2009. Dr. Pratt noted claimant had left shoulder and right wrist symptoms dating back to January 2005.¹ Dr. Pratt evaluated claimant and his assessment included cervical disc disease, left shoulder pain, and right wrist pain, including the need to rule out carpal tunnel syndrome. An EMG suggested mild right carpal tunnel syndrome. Dr. Pratt recommended occupational and physical therapy for three weeks followed by reassessment. He provided claimant with medication and light duty restrictions.

On May 13, 2009, claimant filed an application for hearing in which she alleged right forearm, shoulder and neck pain from repetitive work. That same month, she moved from Kansas to Texas.

Claimant attended two or three physical therapy sessions in January 2010, but “refused progression of program and wanted only modalities”² Claimant was discharged from therapy due to poor compliance.

Outside of authorized treatment, claimant reported a “history of exploded discs” to Ulysses Urquidi, M.D., on March 30, 2010.³ Intervertebral disc degeneration was included in the doctor’s assessment and he prescribed Vicodin.

On May 30, 2012, claimant complained to Dr. Urquidi about having neck pain, a history of degenerative disc disease and increased paresthesias in her arms. The doctor prescribed cyclobenzaprine and Tylenol no. 3, in addition to ordering a cervical spine MRI.

On June 20, 2012, claimant had a cervical spine MRI. The report is not in evidence.

¹ Medical records from Manouchehr Rafaeian, M.D., dated June 22 through December 2, 2004 comment on claimant having a head contusion, cervical muscle strain, bilateral upper trapezius and shoulder pain, left hand pain and apparent bilateral carpal tunnel syndrome. Claimant also had a cervical spine MRI on July 16, 2004. The MRI was read as showing osteophytosis and moderate stenosis at C5-6 and C6-7.

² Respondent’s Application for Dismissal Based on Lack of Prosecution (filed Oct. 27, 2014), Ex. A (admitted at Dec. 12, 2012 Motion Hrg., pp. 6-7).

³ It appears Dr. Urquidi was claimant’s primary care physician. Many of the doctor’s records do not mention claimant complaining about physical injuries she alleges are due to her work for respondent.

In a July 2, 2013 record, Raquel Bermudez, FNP (Family Nurse Practitioner), noted claimant's intervertebral disc degeneration was well-controlled, apparently with ibuprofen 800 mg.⁴

On May 5, 2014, claimant filed a Motion To Extend Statute Of Limitations. On October 27, 2014, respondent filed an Application For Dismissal Based On Lack Of Prosecution.

Nurse Practitioner Bermudez indicated on October 13, 2014, claimant reported a history of trauma five years earlier, neck discomfort and bilateral carpal tunnel syndrome. Ibuprofen helped claimant's symptoms. Ms. Bermudez suggested a cervical spine MRI.

Claimant had a cervical spine MRI on November 5, 2014. It was interpreted as showing mild to moderate degenerative changes and stenosis at many levels, in addition to a C5-6 disc protrusion.

On November 17, 2014, claimant complained to Nurse Practitioner Bermudez that she had bilateral hand and leg pain. Ms. Bermudez suggested claimant see a neurosurgeon. She also prescribed Tramadol.

Claimant did not attend the hearing to extend her time to prosecute her claim or face dismissal. The judge's December 16, 2014 Order stated:

The motion for an extension was filed prior to the five year limitation. No evidence was presented that the claimant has reached maximum medical improvement. Claimant's Exhibit 1 is medical records that indicate the claimant has been and is currently receiving medical treatment for areas she originally alleged injury as well as other areas. From the evidence provided, it is found that the claimant has not reached maximum medical improvement. Therefore, the claimant's Motion To Extend Statute Of Limitations should be and the same is hereby granted for an additional 6 months, or until June 12th, 2015. The respondent's Application To Dismiss is denied at this time.

On May 6, 2015, claimant saw Angel J. Garcia, M.D., at El Paso Center for Family Practice and Sports Medicine. Her chief complaint was upper and left-sided back and scapular pain. She told Dr. Garcia she worked at a meat processing plant and constantly pushed and pulled heavy pieces of meat with her left arm. Dr. Garcia's assessment was "[u]nchanged."⁵ He recommended a trial of physical therapy and medication and asked claimant to schedule a follow-up appointment in one month.

⁴ Many of Ms. Bermudez's records do not mention claimant complaining about physical injuries she alleges are due to her work for respondent.

⁵ Motion Hrg. (Aug. 7, 2015), Claimant Ex. 1 at 5.

Claimant filed a Motion to Extend on June 2, 2015. Respondent filed an Objection to the Motion on June 5, 2015. Claimant demanded medical treatment approximately a week later. Claimant did not attend the hearing. The judge stated in her August 10, 2015 Order:

The only evidence presented that the claimant is receiving medical treatment is a report from El Paso Family Practice and Sports Medicine dated May 6, 2015, almost 5 months since the extension was granted. There is also included a report which indicates that a MRI was conducted in November of 2014 and compared it to one done in June of 2012. This report was submitted at the prior hearing. Dr. Angel Garcia's report stated that the assessment was unchanged. He advised against complete bed rest and counseled on activity as tolerated. He suggested a trial of physical therapy, mobic and flexeril and wanted to reassess in one month. No evidence was presented that the claimant followed up with Dr. Garcia a month after her appointment on May 6, 2015.

...

After review of the file and the evidence presented, it is found that the claimant has failed to actively pursue medical treatment and prosecute her claim. She has not presented evidence that she is not at maximum medical improvement. The report submitted indicates that her condition is the same as it was in November of 2014. The claimant can not claim at each hearing for extension of time that she needs additional medical treatment and then not request or obtain any treatment until just prior to the next hearing. In fact, the report submitted in support of this extension clearly states that the claimant is to return in one month for a follow up appointment and no evidence was presented to show that she scheduled or attended any additional appointments. The claimant's Motion for Extension of Time to Proceed to Regular Hearing should be and the same is hereby denied and the claim is dismissed with prejudice.

PRINCIPLES OF LAW

K.S.A. 2008 Supp. 44-523(f) states in relevant part:

Any claim that has not proceeded to final hearing, a settlement hearing, or an agreed award under the workers compensation act within five years from the date of filing an application for hearing pursuant to K.S.A. 44-534, and amendments thereto, shall be dismissed by the administrative law judge for lack of prosecution. The administrative law judge may grant an extension for good cause shown, which shall be conclusively presumed in the event that the claimant has not reached maximum medical improvement, provided such motion to extend is filed prior to the five year limitation provided for herein.

ANALYSIS

Other than medication and cervical spine MRI scans in 2012 and 2014, claimant obtained on her own, she received very little medical treatment after abandoning authorized physical therapy in early-January 2010. Claimant did not see Dr. Garcia until almost five weeks before her June 12, 2015 deadline expired. The Board shares the judge's concerns that claimant may have been simply waiting to seek medical treatment just prior to the end of the five year deadline and also the end of the six month extension to give the appearance she was not at MMI. However, even if claimant is somehow putting forth minimal effort and possibly trying to push the limits of the workers compensation system, we do not equate such factors as showing claimant is at MMI.

Claimant contends she is not at MMI. There is no medical evidence showing claimant is at MMI, at least no doctor reached such conclusion.

Whether claimant is actively pursuing medical treatment is not necessarily indicative of her having reached MMI. Arguably, she is pursuing medical treatment, albeit at a sloth-like pace.

The judge indicated claimant's condition was the "same" in May 2015 as it was in November 2014. The record, however, does not indicate to what Dr. Garcia is comparing claimant's condition when he indicated his assessment was unchanged. It appears no prior assessment could be changed or unchanged because Dr. Garcia never evaluated claimant until May 6, 2015, at least based on the current record.

Even if such conclusion was accurate – that claimant remained unchanged between November 2014 and May 2015 – such fact would not mandate claimant is at MMI. In fact, the judge previously found claimant to have not reached MMI based on her treatment records through November 17, 2014. If she was not at MMI in November 2014 and she was the "same" in November 2014 and May 2015, would she still not be at MMI?

As for the concern that there was no evidence claimant attended a follow-up appointment with Dr. Garcia one month after his May 2015 evaluation, the Board will not assume claimant did not do so. Again, even if she did not attend a follow-up appointment, such failure would not mean she is at MMI.

Based on the current record, we find claimant is not at MMI and her time limit to prosecute her claim should be extended a reasonable time.

Any party or the judge can obtain an independent medical evaluation to assess whether claimant is at MMI. Either party could schedule a prehearing settlement conference and a regular hearing to move this matter along.

CONCLUSIONS

Having reviewed the entire evidentiary file contained herein, the Board finds the August 10, 2015 Order should be reversed. Claimant is not at maximum medical improvement. This matter is remanded for a determination of claimant's deadline to prosecute her claim.

AWARD

WHEREFORE, the Board reverses the August 10, 2015 Order and remands this matter to the judge for a determination of claimant's deadline to prosecute her claim.

IT IS SO ORDERED.

Dated this _____ day of September, 2015.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Conn Felix Sanchez
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Shirla R. McQueen
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Honorable Pamela J. Fuller